(17,446.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 332.

F. MAY & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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a UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

F. MAY & COMPANY, Plaintiffs in Error,
versus
CITY OF NEW ORLEANS, Defendant in Error. } No. 12957.

Gurley and Mellen, for plaintiffs in error.
Samuel L. Gilmore, city attorney, and Walter B. Sommerville, assistant city attorney, for defendant in error.

Writ of error to the supreme court of the State of Louisiana from the Supreme Court of the United States of America, returnable at the city of Washington, D. C., within thirty (30) days from the twenty-fourth (24th) day of May, A. D. 1899.

Transcript of Record.

1 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

Suspensive appeal of the city of New Orleans from judgment of this honorable court, division D, Honorable N. H. Rightor, judge, rendered June 24, 1898, and signed June 30, 1898.

Petition of F. May & Co., Praying for an Injunction against the Treasurer of New Orleans to Restrain Him from Selling Personal Property, etc.; Affidavit & Order Thereon.

Filed February 10, 1898.

Civil District Court, Parish of Orleans, Division D—Honorable N. H. Rightor, Judge.

F. MAY & Co.
vs.
CITY OF NEW ORLEANS. } No. 55687.

To the honorable judges of the civil district court for the parish of Orleans and State of Louisiana:

The petition of F. May & Company, a commercial firm domiciled and doing business in this city, composed of Fernand May and Edouard May, both residents of this city, unto your honor- respectfully represents:

That during the whole of the year 1897 they were engaged in importing for sale foreign goods, upon all of which they paid duties and imposts levied by the United States. Petitioners further represent that the board of assessors for the parish of Orleans assessed them for the year 1897 as follows, to wit:

Merchandise and stock in trade..... $2,500
Money loan- on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description..... 1,000

Now, your petitioners further represent that said assessments are null and void for the following reasons, to wit:

1. All of the said merchandise and stock in trade had and carried by them during 1897 consisted of dry goods imported by them from foreign countries and upon which duties, imposts, and import taxes were levied by the United States and paid by them and which was sold only in unbroken original packages as imported, and that said assessment thereon is violative of article 1, section 10, para-
2 graph 2, of the Constitution of the United States, and is absolutely unconstitutional, null, and void.

2. All the credits and bills receivable of said firm during 1897 consisted exclusively of sums due upon the purchase price of the said merchandise sold, as aforesaid, in unbroken and original packages as imported, and the assessment thereon is violative of the said provision of the Constitution of the United States and is absolutely unconstitutional, null, and void.

3. Said assessment of $1,000, "money loaned on interest," is unconstitutional, null, and void, because your petitioners at no time during 1897 had any money whatever loaned on interest.

Your petitioners further represent that George B. Penrose, treasurer of the city of New Orleans, has threatened to seize your petitioners' personal property and advertise and sell the same in order to enforce the collection of the taxes claimed to be due upon said illegal and unconstitutional assessment, to wit, $74.80, and your petitioners fear that said treasurer will so do unless restrained by this honorable court; that a writ of injunction is necessary to protect your petitioners' rights in the premises.

Wherefore, the premises and the annexed affidavit and bond being considered, petitioners pray that a writ of injunction issue from this honorable court restraining, prohibiting, and enjoining George B. Penrose, the treasurer of the city of New Orleans, from seizing and advertising for sale and selling any personal property of your petitioners to enforce the payment of any tax claimed to be due on the assessments for 1897 against your petitioners hereinabove set forth; that the City of New Orleans, through its mayor or other proper officer, be duly cited to appear and answer to this petition, and, after due proceedings had, that judgment be rendered in your petitioners' favor, making the said injunction perpetual and decreeing said assessment to be illegal, unconstitutional, null, and void; and your petitioners pray for all costs and general relief.

(Signed) GURLEY & MELLEN,
Att'ys for Petn.

Affidavit.

3 Fernand May, being duly sworn, deposes & says that he is the senior partner in the firm of F. May & Co., plaintiffs in the foregoing petition; that he has read the said petition, & that all the allegations therein contained are true & correct.

(Signed) FERNAND MAY.

Subscribed & sworn to before me this 25th January, 1898.

[SEAL.] (Signed) GEO. W. MONTGOMERY, *Not. Pub.*

Order.

Let a writ of injunction issue herein as prayed for & according to law upon plaintiff's giving bond, conditioned & payable as the law directs, in the sum of two hundred ($200.00) dollars.

New Orleans, February 10, '98.

(Signed) F. A. MONROE, *Judge.*

Bond for Injunction.

Filed February 10, 1898.

Know all men by these presents that we, F. May & Co., as principal, and Maurice Generelly, as security, of the city of New Orleans and State of Louisiana, are held and firmly bound unto the treasurer of the city of New Orleans in the sum of two hundred dollars, lawful money of the United States of America, to be paid to said treasurer or his successor in office; for which payments, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated the 10th day of February, in the year of our Lord 1898.

Whereas the said F. May & Co. have this day presented a petition to the honorable the civil district court for the parish of Orleans praying for a writ of injunction:

Now, the condition of the above obligation is that we, the above-bound F. May & Co. and Maurice Generelly, will well and
4 truly pay to the said treasurer of The City of New Orleans, the defendant in said injunction, all such damages as he or said city may recover against us in case it should be decided that the injunction was wrongfully obtained.

(Signed) F. MAY & CO. [SEAL.]
(") M. GENERELLY. [SEAL.]

Signed, sealed, and delivered in the presence of—

—— ——.

Writ of Injunction.

Issued February 10, 1898.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

F. MAY & Co.
versus
CITY OF NEW ORLEANS. } No. 55687.

The State of Louisiana to George B. Penrose, city treasurer of the city of New Orleans, New Orleans, Greeting:

You are hereby commanded, enjoined, restrained, and prohibited, in the name of the State of Louisiana and of the civil district court for the parish of Orleans, from seizing and advertizing for sale and selling any personal property of plaintiffs, the commercial firm of F. May & Co., composed of Fernand May and Edouard May, to enforce the payment of any tax claimed to be due by the city of New Orleans on the assessments for 1897 against said plaintiffs, described as follows, to wit:

Merchandise and stock in trade	$2,500
Money loaned on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description.....	1,000

And you are so to remain enjoined, restrained, and prohibited until the further order of this court.

Witness the Honorable F. A. Monroe, N. H. Rightor, Geo. H. Theard, T. C. W. Ellis, and F. D. King, judges of our said
5 court, this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, and in the one hundred and —, 122, year of the Independence of the United States.

[SEAL.] (Signed) P. J. TOURNILLON, *D'y Clerk.*

Sheriff's Return on Writ of Injunction.

Filed February 15, 1898.

Received Thursday, Feb. 10, 1898, and on the same day, month, and year served a copy of the within writ of injunction personally on George B. Penrose, city treasurer of the city of New Orleans, defendant herein.

Returned same day.

Sh'ff's fees, 2.00.

(Signed) J. ARTHUR BLANC, *D'y Sh'ff.*

Answer of City of New Orleans.

Filed February 14, 1898.

Civil District Court, Division D.

F. MAY & Co. vs. CITY OF NEW ORLEANS. } No. 55687.

Now into court comes the City of New Orleans, and, for answer to the petition of plaintiff herein, denies all and singular the allegations thereof, and asks that the same be dismissed at plaintiff's costs.

(Signed) W. B. SOMMERVILLE,
Ass't City Att'y.

N. O., Feb'y 14, '98.

Answer of City of New Orleans.

Filed March 10, 1898.

Civil District Court, Division D.

F. MAY & Co. vs. CITY OF NEW ORLEANS. } No. 55687.

6 Now into court comes The City of New Orleans, defendant herein, and, for answer to plaintiff's petition, denies all and singular the allegations therein contained.

Wherefore defendant prays that the preliminary injunction issued herein against George B. Penrose, treasurer, be dissolved and set aside, and that plaintiffs' suit be dismissed at their cost.

(Signed) W. B. SOMMERVILLE,
Assistant City Attorney.

New Orleans, March 10, 1898.

Continued.

Extract from the Minutes of Division D.

WEDNESDAY, *June* 1, 1898.

Present: Honorable N. H. Rightor, judge.

Civil District Court, Division D.

F. MAY & Co. vs. CITY OF NEW ORLEANS. } No. 55687.

This case was continued with preference.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

F. MAY & Co.
vs.
CITY OF NEW ORLEANS. } No. 55687. Division "D."

Testimony on Behalf of Plaintiff, Taken in Open Court on the 15th Day of June, 1898.

Before the Honorable N. H. Rightor, judge.

Present: Gurley & Mellen, for plaintiff.
" W. B. Sommerville, for defendant.

Counsel for plaintiff produces and offers in evidence the writ of injunction herein issued and the return of the sheriff thereon.

Counsel for plaintiff also produces, offers, and files in evi-
7 dence a copy of the assessment-rolls for the years 1896 and 1897, showing the assessment against F. May & Co.

EDWARD MAY sworn for plaintiff.

Examination-in-chief by Mr. MELLEN:

Q. Mr. May, you are the junior member of the firm of F. May & Co.?

A. I am.

Q. How long have you been a member of that firm?

A. I have been a member of that firm about three or four years.

Q. Where is the senior member of your firm?

A. He is abroad at present.

Q. When you say "abroad" you mean in Europe?

A. Yes.

Q. Will you please state what was the business of your firm in 1897?

A. Our business was this: We go to Europe and call on different manufacturers there, obtaining from them samples, which they send to us here in New Orleans. With those samples we call upon the trade of New Orleans and other cities and take on those samples what is known as import orders. Those orders we then forward to the different manufacturers in Europe, and the goods are shipped to us. Those are what are known as import orders.

Besides that, if we think any article is good we place what is known as stock orders—that is, we order goods from there for our own account; but in most cases we sell those goods to arrive and do not keep a stock of them on hand. All our goods are imported goods. We do not handle any domestic goods.

Q. You pay custom duties on all of your goods?

A. Yes; we pay duties in the custom-house.

Q. Now, Mr. May, do you or not sell those goods which you import in original packages?

A. We sell them in original packages, because the bulk of our

trade is jobbing trade. They may order two, three, or five hundred packages. For instance, sometimes we may order five hundred dozen towels. They may come packed two, three, or five
8 dozen in a package. Such a package we never break, and if a small customer comes in we may sell him one package. It has often happened that customers wanted a sample, and I might break a package to get a sample.

Q. That was to be used simply as a sample?

A. Yes; in fact, we have a great many loose samples, a great many samples for which we have no use.

Q. Upon those samples you obtain orders?

A. Yes; we obtain orders on samples.

Q. Then, to illustrate, take a case of five hundred dozen towels; they would be put up in packages of, say, five dozen each. Now, when they are shipped to you by the manufacturer in Europe, I understand that those five hundred dozen towels would be enclosed in one big wooden case?

A. Yes.

Q. Of course, you receive that big wooden case?

A. Yes.

Q. And when you go to deliver those towels do you break any of the packages in that wooden case?

A. Five hundred dozen towels would represent one hundred packages of five dozen in each package; now, some cases containing such goods may not come to the store at all; the cases may go right to the customer unopen; but if there are in that case two or three orders, then we bring the case to the store and open it and take out the different orders, but we never open any of the packages in the case.

Q. You spoke of an order book. How many order books have you?

A. Each member of the firm has an order book and each traveler has an order book.

Q. This book I now show you is your own book?

A. That is my own order book. Here is an order from Leon Godchaux for thirteen thousand yards of coating; those goods were ordered to be shipped to New York city; they never even came to our store. Now, here in another order, we never even opened that case; we never open a case unless there happens to be in the same case goods intended for different customers; then we bring
9 the case to the store and open it and separate the goods for the different customers, but in most cases the goods go direct from the custom-house to the customer.

It has happened that large firms here will come to our store and ask us as a favor to give them one piece of bobbinet. Now, bobbinet comes in packages of two or three pieces, and we have refused positively to sell less quantity than a package; we tell them that they must take a package.

Q. Now, Mr. May, can you state approximately what percentage — your whole business consists of import orders such as you have shown by your order book?

A. How was that?

Q. You say you do business by import orders such as found in that book, and you also do some business out of your store?

A. Yes.

Q. What is the percentage of your business consisting of import orders?

A. That would be hard to say exactly. I would say that sixty or sixty-five per cent. of our business is done by orders. Of course some goods in stock are sold to some parties who give us orders—jobbers in New Orleans, Cincinnati, and other cities.

Q. Those goods are sold in the same way?

A. Yes; only they have been taken out of the cases and put in stock.

Q. Have you any goods at all other than imported goods?

A. No; none.

(Cross-examined by Mr. SOMMERVILLE:)

Q. Will you please explain again what you mean by import orders?

A. I mean an order which is placed on samples to be manufactured. For instance, if I submit to a buyer lines of samples of towels and he gives an import order, he understands that that order is to be manufactured, and that the delivery will not be made for three or four months; but if he placed a stock order, the order is for goods that are in my store, ready for delivery.

Q. Who does the ordering when you get an import order—yourself or the person for whom the goods are to be imported?

10 A. We always order them for our own account. A man may give us an order for two hundred dozen towels, and I may give an order on the manufacturer for five hundred dozen, three hundred of which I will have no order for, but while they are in process of being manufactured I will sell them, to arrive.

Q. Then the goods that come to you are the goods of F. May & Co.?

A. Yes.

Q. You are the owner of the goods?

A. We are the owners of the goods.

Q. How many members compose the firm of F. May & Co.?

A. Two; my brother and myself.

Q. Is this book to which you have referred a book of import orders only or is it a book of all orders?

A. It is a book of all orders.

Q. I see here an order for twenty-five gross of lace edging. Does that twenty-five gross of lace edging compose a complete and original package?

A. Yes. I will explain that. A gross consists of twelve pieces of lace, and each piece is twelve yards. Twelve pieces of twelve yards each are put in a box, and there is paper around that box and a twine tied around the paper, and that is what I consider an original package. Twenty-five gross would represent twenty-five packages.

Q. They are put in cartoons or pasteboard boxes?

A. Yes.

Q. And those cartoons or pasteboard boxes are put in another box?

A. They are put in a case.

Q. And that case is received by you?

A. Yes.

Q. And from that case you deliver your orders, consisting of cartoons, to different customers?

A. If one case contains only one order we send the case directly to the man who gave the order. If it happens to contain two or three orders, it comes to the store, the case is opened, and the orders separated.

11 Q. Look at this order which I have before me now in this book and tell me whether that order was delivered from your store in one of those cases or was it delivered directly from the custom-house.

A. In this particular instance, if there were not goods in the case intended for any other customer, it went directly to this man, but there is more goods than would fill one case.

Q. You say there is more than enough goods to fill one case?

A. Yes.

Q. So there is a broken case represented in that order?

A. How a broken case?

Q. There are goods taken out of a complete case?

A. Well, you see in an order like this one they might use a very large case or one case and a smaller one, and those two cases might represent the order.

Q. Then you cannot speak positively about that order?

A. I cannot speak positively about that order except that there was more than one case of goods, unless they used a very, very large case.

Q. Look at the next order. What does that represent?

A. That would represent two cartoons of lace, not enough to make a case.

Q. That is, two small paper-board boxes of lace?

A. Yes.

Q. Did you receive those two boxes of lace just as you sold them or did they come in a case?

A. They came in a case with another order.

Q. Now, look at the one next to that.

A. That also came in a cartoon.

Q. And that cartoon was with other cartoons in a large case?

A. Yes.

Q. And the next one?

A. The same reply applies to that.

Q. None of these cartoons came to you except put together with other cartoons in a large case?

A. They all came in a case and the whole case might not

12 have been intended for one customer.

Q. It was not always so in 1897 that the goods in one case went to one customer?

A. No.

Q. Different articles came in the same case intended for different customers and you opened the case and delivered the articles to the different customers?

A. Yes; but one case contains only lace, another towels, another bobbinet, etc.

Q. If a person went to your store on Chartres street and ordered a dozen pairs of stockings would you sell them?

A. I would not.

Q. Are not some of these orders for stockings?

A. We sell on import orders only.

Q. How would you do with your stock goods?

A. Anything we have in stock we sell.

Q. What do you mean by stock?

A. Suppose a man was to come in the store to buy bobbinet, we would explain to him that he would have to buy at least one package; that we would not sell one piece only; that we only sold in packages. We have packages of two, three, and four in each package.

Q. And those packages are put in a larger case of how many in each case?

A. That varies; thirty, forty, or fifty.

Q. Are those bobbinets kept as stock goods?

A. Yes; but the bulk of the business in bobbinet is done directly on import orders, and sometimes we sell six, seven, or eight cases to one firm that never comes to the store.

Q. When you sell those cases you sell them just as you receive them?

A. Yes; but we don't sell them by the case. Here is an order for seven hundred and fifty yards of suiting; that was a very large order which came to be delivered in New York.

Q. I am talking now about goods in New Orleans.

A. Bobbinets would come in a case, but we don't sell them by the case.

Q. Then you break cases of bobbinet to sell them?

13 A. Whenever one case contains more than one order we break the case.

Q. You did in 1897 break cases of bobbinet?

A. We did, and separated the several orders contained in the case.

Q. And then you sold these stock goods just as you received orders for them?

A. Yes; without breaking the packages.

Q. What is this order?

A. That is for lace.

Q. What is this?

A. That is for linen. As I was telling you, we were selling to very large houses. Here is a firm in St. Louis reputed to be one of the largest firms in the country outside of New York. Those people

buy eighty dozen towels, one hundred and eighty dozen, one hundred dozen, two hundred dozen, one hundred dozen, and fifty dozen doylies. Now, those orders I might send over there, but they are orders such as a manufacturer would take direct from them.

Q. And you fill that order?

A. We fill the order, and we may fill a similar order out of the stock. The packages contain three or four dozen each, but in no instance do we open a package.

Q. But these packages were in stock; they were on the shelves of your store?

A. Yes; in the original packages, which I consider the original packages.

Q. What does your stock consist mostly of?

A. Bobbinet and household linens. Now, we have also in the store a good many samples; we have samples of dolls and toys, and we have samples of household linens, of towels, sheets; also embroideries and laces.

(By Mr. MELLEN:)

Q. You are continuing your business in 1898 in the same way as in 1897?

A. Yes.

Q. I forgot to ask you whether your firm had any money loaned on interest in 1897.

A. None whatever.

Q. Now, what credits or bills receivable were there of your firm in 1897?

14 A. Our bills receivable consisted of simply money due to us by customers who had given orders that had been filled, and which they had not paid for.

Q. On sales of those imported goods?

A. Exactly.

Q. Under the head of money loaned on interest, all credits and all bills receivable for money loaned or advanced or for goods sold and all credits of any and every description, etc., on the assessment—did your firm in 1897 have any property of the kind mentioned in any of those items?

A. We had bills receivable only.

Q. And they were what you have just stated, money due you upon imported goods sold by you?

A. Yes.

(By Mr. SOMMERVILLE:)

Q. Some of which goods were sold in these cartoons as you describe and not in the original packages?

A. Some of which were sold out of stock and some on import orders.

(By Mr. MELLEN:)

Q. Let us make that clear. I understand you to say—let us take this case of cartoons of laces. You may order such a quantity of

laces as would consist of, say, fifty cartoons, and the factory ships them to you in a large wooden box?

A. The packer does that. The manufacturer does not even put them in a case himself, but gets the packer to do that; and there are certain goods not in the lace line, but in the household linen line, which do not come in cases; they come in bales.

Q. I want to get a thorough explanation of the way you get at these goods. Say a dozen or more packages of goods are shipped by the manufacturer in a wooden box for convenience, as I understand many of those cases go direct to your customers?

A. A great many.

Q. And in other cases, where they contain more then one order, the cases are opened by you and the orders separated?

A. Yes; but the order is generally sent in the case itself. The goods may be shipped in a wrapper by express. The case does not signify that this is the original package. The original
15 package is the one in which the goods are put up at the factory. If a manufacturer puts up five dozen towels in a package that package is the original package, and if I open that package I break the original package; but, whether he puts those packages in a case or not, it remains in the original package. The original package is the original wrapper put around the goods at the factory, and is known as such in the trade.

Endorsed: 55687. F. May & Co. *vs.* City of New Orleans. Testimony — pl'ff. Filed June 23, '98. (Signed) W. H'y Allen, d'y clerk.

(Copy.)

Assessment-roll for 1897.

Filed June 15, 1898.

Offered in Evidence by Counsel for Plaintiff.

(Here follows assessment-roll.)

16 Continued.

Extract from the Minutes of Division D.

WEDNESDAY, *June* 15, 1898.

Present: Honorable N. H. Rightor, judge.

Civil District Court, Division D.

F. MAY & CO.
vs.
CITY OF NEW ORLEANS. } No. 55687.

This case came up this day for trial.
Present: Gurley & Mellen, att'ys for pl'ff.
" W. B. Sommerville, for City — N. O.
When, after hearing pleadings, evidence, & counsel, the court

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

continued said case to Thursday, June 23rd, 1898, at 11 o'clock, for argument.

Submission.

Extract from the Minutes of Division D.

THURSDAY, *June* 23, 1898.

Present: Honorable N. H. Rightor, judge.

Civil District Court, Division D.

F. MAY & Co. *vs.* CITY OF NEW ORLEANS. } No. 55687.

This case came on this day for argument.
Present: Gurley & Mellen, att'ys for pl'ff.
Present: W. B. Sommerville, att'y for City of N. O.
When, after hearing argument of counsel, the court took the matter under consideration.

Judgment.

F. MAY & Co. *vs.* CITY OF NEW ORLEANS. } No. 55687.

In this case submitted to the court for adjudication, the court considering the law and the evidence to be in favor of the plaintiff and against the defendant, and for the reasons orally assigned—

It is ordered, adjudged, and decreed that there be judgment in favor of plaintiff, F. May and Co., and against the defendant, The City of New Orleans, perpetuating the writ of injunction issued
17 herein and decreeing the assessment against the said F. May and Co. to be unconstitutional, null, and void, and for costs.

Judgment rendered June 24th, 1898.
Judgment signed June 30th, 1898.
(Signed) N. H. RIGHTOR, *Judge.*

Petition for Appeal, Order, & Acceptance of Service Thereon.

Filed July 12, 1898.

Civil District Court, Division D.

F. MAY & Co. *vs.* CITY OF NEW ORLEANS. } No. 55687.

The petition of The City of New Orleans, defendant herein, with respect, represents that a final judgment herein was rendered June 24, 1898, and signed June 30, 1898, & that there was error to the

prejudice of the City of New Orleans therein, and that it feels aggrieved thereby and desires to appeal suspensively therefrom.

Wherefore defendant prays that F. May & Co., Fernand May & Edou-rd May, plaintiffs, be cited to appear and answer hereto, & that a suspensive appeal be allowed the City of New Orleans from the judgment herein rendered June 24, 1898, and signed June 30, 1898, returnable to the honorable the supreme court of Louisiana on the first Monday in November, 1898, without bond, as the law directs.

(Signed) W. B. SOMMERVILLE,
Ass't City Att'y.

Order.

Let a suspensive appeal issue herein on the petition of the City of New Orleans from the judgment herein rendered June 24th, 1898, and signed June 30, 1898, returnable to the honorable the supreme court of Louisiana on the 1st Monday of November, 1898, without bond.

New Orleans, July 11, '98.

(Signed) F. A. MONROE,
Judge of This Court, Div. "C," Acting for the Hon. N. H.
18 *Rightor, Judge Div. "D," Now Absent on Leave.*

Service accepted.

(Signed) GURLEY & MELLEN,
Att'y- for Pl'ffs.

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, Jas. C. Peyton, d'y clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing twenty-three (23) pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, and evidence adduced upon the trial of the cause wherein F. May & Co. is plaintiff and City of New Orleans is defendant, instituted in this court and now in the records thereof under the No. 55687 of the docket of this honorable court, division "D," Honorable N. H. Rightor, judge.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this fourteenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, and in the one hundred and twenty-third year of the Independence of the United States of America.

[SEAL.] (Signed) JAS. C. PEYTON, *D'y Clerk.*

Proceedings Had in the Supreme Court of the State of Louisiana.

Transcript of appeal.

Filed November 9th, 1898. (Signed) Paul E. Mortimer, Deputy Clerk.

Cause Heard and Submitted.

(Extract from Minutes.)

19 NEW ORLEANS, FRIDAY, *March 10th*, 1899.

The court was duly opened pursuant to adjournment.

Present: Their honors Lynn B. Watkins, Joseph A. Breaux, and Newton C. Blanchard, associate justices.

Absent: Francis T. Nicholls, chief justice.

F. MAY & CO.
vs.
CITY OF NEW ORLEANS. } No. 12957.

This cause came on this day to be heard, and was argued by Mr. Walter B. Sommerville, assistant city attorney, on behalf of the defendant and appellant; whereupon the court took the cause under advisement upon the briefs now on file for the parties in interest.

Opinion of the Court.

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, *April* 3, 1899.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices.

His honor Mr. Justice Blanchard pronounced the opinion and judgment of the court in the following case:

20 F. MAY & CO.
vs.
CITY OF NEW ORLEANS. } No. 12957.

Appeal from the civil district court, parish of Orleans.

RIGHTOR, *J.*:

Plaintiffs are importers of merchandise. Their place of business and store is in the city of New Orleans. They were assessed for the year of 1897 on "merchandise or stock in trade" at $2,500, and under the printed heading on the assessment-roll of "money loaned

on interest, all credits and all bills receivable for money loaned or advanced, or for goods sold, and all credits of any and every description," they were assessed at the further sum of $1,000.

They refused to pay the city tax based on this assessment on the ground that the same is void because in conflict with art. 1, section 10, paragraph 2, of the Constitution of the United States.

Their position is that the merchandise and stock of goods carried by them in 1897 consisted of dry goods imported from foreign countries upon which duties were levied by the United States and paid by them; that the goods so imported were by them sold only in the unbroken original packages, and that the only credits and bills receivable appertaining to the firm were those representing sums due them on account of the sale, as aforesaid, of goods in the original packages.

They brought this action to have the assessment declared unconstitutional and void, and coupled with it a proceeding by injunction to restrain the city treasurer from attempting to enforce payment of the taxes.

The city answered by general denial, and from a decree favorable to the plaintiffs prosecutes this appeal.

The tax assessor appears to have arrived at the conclusion that part, at least, of the merchandise received by plaintiffs at their place of business, kept in stock there and sold during the year 1897, had lost its distinctive character of "goods in the original package" by the breaking of the packages in which imported,
21 and that the contents of such packages so broken had become incorporated into the general mass of property in the State in such way as to become the objects of State and municipal taxation.

Accordingly, to reach and tax this part of their stock, he returned an assessment of $3,500, in the aggregate, against them.

The burden of proof is on plaintiffs, resisting the assessment and asserting exemption, to show that no part of their stock of merchandise is of the character rendering it subject to taxation, and that no portion of their credits or bills receivable were for goods sold which were subject to taxation.

If it appears from the evidence that they kept in stock and sold goods which must be considered at the time of such keeping and sale not to have been in the "original package," in the legal interpretation of that phrase, if the original packages in which such goods were had been broken and merchandise taken therefrom, put in stock and sold, then are plaintiffs subject to this taxation.

It is established, we think, that plaintiffs imported a large quantity of merchandise; that such merchandise was bought for their account, they were the parties ordering same, and to whom the goods were shipped, and in this sense were the vendees thereof; that the greater part or from 60 to 65 per cent. of the merchandise so imported was purchased on import orders or for customers whose orders they had taken; that the remainder was purchased for their own stock and sold as such out of their store; that the goods purchased on import orders (for those ordering same), as well as those purchased on stock orders (for their own store), would be shipped

in large wooden cases; that a case would sometimes contain only the goods embraced in one order (that is to say, all for one firm or business house), and then it would be delivered to such firm or business house in the original package; that at other times a case would contain the goods to fill several orders of different firms and business houses, in which event the original package in which they were imported would be opened by the importer and the goods for the different orders sorted out, separated, and delivered to those ordering same, and that sometimes goods purchased on stock orders (for their own store) would be shipped in large cases, which
22 when received by the importer would be opened and the goods taken out and put in stock and sold, but that such goods were only sold in the packages in which they were put by the manufacturer—that is to say, a case would contain many packages, these packages would be taken out of the case, which was broken for the purpose, but the packages themselves would not be broken.

The business of plaintiffs as importers was, in this sense, a wholesale business, selling only by the package as put up by the manufacturer, not a retail business, because no package was broken and the individual articles of the same kind and make it contained were not sold separately.

Sometimes a case would contain goods purchased on import orders for customers and likewise goods purchased on stock orders for the importers themselves. When this was so the case would be opened by the plaintiffs, who would take out the goods purchased on the import orders and deliver same to their customers so ordering, and the goods purchased on the stock orders would also be removed from the case and sold as stock to those choosing to buy.

All the goods, whether purchased on import orders or stock orders, that came to plaintiffs did so as the goods of F. May & Co.; they were the owners of same.

The goods plaintiffs kept in stock were for the most part bobbinet and household linens, towels, sheetings, embroideries, laces, etc.

They dealt only in imported merchandise. The goods mentioned would be put up by the manufacturers in convenient packages. For instance, towels may be put up by the manufacturer in packages containing two, three, or five dozen to the package; but a large order for towels might include five hundred dozen towels. These would all come in one case done up in packages of (say) five dozen to the package. The importer would open the case, take these packages of towels out, and sell them by the package. He would not break a package to sell one or more towels.

Conducting their business on this line, plaintiffs claim to sell only in the original package.

The question, then, which the case really presents is, what
23 is the "original package"?

Is it the package in which the goods are put up for *the* convenience by the foreign manufacturer or is it the case, the box, the covering in which the goods so put up by the manufacturer are

packed for shipment? Is the manufacturer's package the original package in the legal interpretation or must that be held to be the original package which is delivered to the carrier for transportation to the desired destination?

If the package put up by the manufacturer be the original package, then plaintiffs' objection to the assessment complained of is well taken.

If the case or box in which the goods are placed for shipment be the original package, then their case falls.

This court in State *ex rel.* Gelpi & Bro. *vs.* Board of Assessors, 46 La. Ann., 147, defined a package to be a "number of things bound together, convenient for handling and conveyance;" "a bundle put up for transportation or commercial handling."

In the early and leading case of Brown *vs.* Maryland, 12 Wheat., 442, it was said that the thing imported, "while remaining the property of the importer in his warehouse in the original form or package in which it was imported," was not subject to taxation under the prohibition of the Constitution.

In Low *vs.* Austin, 13 Wall., 34, it was said that "goods imported do not lose their character as imports and become incorporated into the mass of property of the State until they have passed from the control of the importer or been broken up by him from their original cases."

In Keith *vs.* State (Ala.), 10 L. R. A., 430, it was held that when intoxicating liquors are imported in small bottles, each of which is wrapped in paper and labeled "original package," the bottles being packed, for the purpose of facilitating the shipment, in an open box marked with the number and size of the bottles contained therein, the box, and not the bottle, is the original package.

To the same effect is State *ex rel.* Cockran *vs.* Winters (Kan.), 10 L. R. A., 616, where the package, as it existed at the time of its transportation, was taken to be the "original package."

Also Guckenheimer *vs.* Sells, 81 Fed. Rep., 997, where it was said that an original package appears to be the package delivered by the importer to the carrier at the initial place of shipment in
24 the exact condition in which it was shipped, and that if afterwards this package be broken, "it comes within the police regulations of the State;" and McGregor *vs.* Cone (Iowa), 39 L. R. A., 484, where it was said that the words "original package" had reference "to a unit which the carrier receives, transports, and delivers as an article of commerce" and which, when sold or broken after delivery, ceases to be an article of interstate commerce, becomes a part of the common mass of property within the State and subject to its tax laws.

Other authorities of the same tenor might be cited, but these suffice to support the contention of the defendant that the "original package" in this case must be held to be that in which the goods were shipped to and received by the plaintiffs and not the smaller packages put up by the manufacturer and packed within the case delivered to the carrier.

It follows that since many of the cases of goods received by plain-

tiffs were opened and the contents removed therefrom and sold after such removal by plaintiffs, the merchandise imported in such cases so afterward broken, as aforesaid, lost its distinctive character as object of foreign commerce not subject while remaining in the original case to the police laws of the State, and thereafter, to wit, after the case was broken and the goods removed therefrom, became incorporated in the general mass of property in the State, and thus subject to State and municipal taxation.

In the Gelpi case, *supra* (46 Ann.), it appearing that the larger part of the assessment of complainants was based upon imported goods never removed from the original cases in which shipped and held by them in such cases as "unbroken packages" for sale, we decided that part of their stock not to be subject to assessment and taxation; the other part of their stock, however, representing goods removed from broken packages, was subject to assessment.

And so in the instant case the goods imported by plaintiffs and remaining in the original boxes or cases or wrappings in which shipped are held to be until sold by the importer not subject to assessment and taxation for State and municipal purposes, but the goods taken from the original cases or boxes or wrappings in which shipped, even though still remaining in the manufacturers' packages, are subject to assessment and taxation by defendant. Accordingly, the assessor having fixed upon $3,500 as the sum covering that portion of plaintiffs' stock and its proceeds for the year 1897 so taken from the broken packages after importation, such assessment must be sustained.

It is, therefore, ordered and decreed that the judgment appealed from be annulled, avoided, and reversed; that the demand of plaintiffs be rejected, their injunction dissolved, and their suit dismissed, with costs in both courts.

Mr. Justice Monroe takes no part, as he was not a member of the court when this case was heard.

Final Judgment.

(Extract from the Minutes.)

NEW ORLEANS, MONDAY, *April 3rd*, 1899.

The court was duly opened pursuant to adjournment—present, their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices—his honor Mr. Justice Blanchard pronounc- the opinion and judgment of the court in the following case:

F. MAY & CO.
vs.
CITY OF NEW ORLEANS. } No. 12957.

On appeal from the civil district court for the parish of Orleans.

It is ordered and decreed that the judgment appealed from be annulled, avoided, and reversed; that the demand of plaintiffs be

rejected, their injunction dissolved, and their suit dismissed with costs in both courts.

Mr. Justice Monroe takes no part, as he was not a member of the court when the case was heard.

Petition for Rehearing.

Filed April 17th, 1899.

26 F. MAY & COMPANY *versus* CITY OF NEW ORLEANS. } No. 12957.

The petition of F. May & Co., plaintiffs, unto your honors respectfully represents that the judgment herein rendered by your honors on the 3rd day of April, 1899, dismissing their suit is erroneous, and they now assign specifically the following errors, to wit:

1st. The court erred in holding that the burden of proof was throughout the trial on the plaintiffs, resisting the assessment and asserting exemption, to show that no part of their stock of merchandise is of the character rendering it subject to taxation.

2nd. The court erred in holding that the box, case, or wrapping in which the goods are shipped from abroad is the original package of imports within the meaning of the provision of the Federal Constitution prohibiting the State from taxing imports.

3rd. The court erred in holding that the package put up by the manufacturer for use in the trade in that form and intended to be sold in that form is not the original package of imports, and that when these packages, though still intact and unbroken, are taken from the large shipping case in which a number of them were placed for convenience of shipment and to lessen cost of transportation and handling they at once lost their character as imports and became incorporated with the general mass of property in the State and subject to local taxation.

Petitioners further represent that the question involved in this case is of the gravest importance and merits the consideration of all the members of this honorable court after full oral argument, the case having been originally presented to only three of your honors, his honor the Chief Justice being ill, and the other seat being vacant by reason of the death of the late Mr. Justice Miller.

Wherefore petitioners pray that they be granted a rehearing and that the case be reopened for oral argument.

Respectfully,

(Signed) GURLEY & MELLEN,
Attorneys for Plaintiffs and Appellees.

27 *Rehearing Refused.*

(Extract from Minutes.)

NEW ORLEANS, MONDAY, *May 15th*, 1899.

The court was duly opened pursuant to adjournment.

Present: Their honors Francis T. Nicholls, chief justice; Lynn B. Watkins, Joseph A. Breaux, Newton C. Blanchard, Frank A. Monroe, associate justices.

F. MAY & Co. *vs.* CITY OF NEW ORLEANS. } No. 12957.

It is ordered that the rehearing applied for in this case be refused.

Petition for Writ of Error and Order.

Filed May 24th, 1899.

F. MAY & Co. *vs.* CITY OF NEW ORLEANS. } No. 12957.

To the honorable the supreme court of the State of Louisiana:

The petition of F. May & Company, plaintiffs herein, unto your honors respectfully represent- that there is error to their prejudice in the judgment and decree herein rendered on the 3rd day of April, 1899, in favor of defendants and against your petitioners, which said judgment and decree became final on the 15th day of May, 1899, and that they desire to sue out and obtain a writ of error in their behalf from the Supreme Court of the United States to this honorable court, and they herewith annex and make part hereof their assignment of errors.

Petitioners further show that they claim certain rights, privileges, and immunities under the Constitution of the United States, and that the said decision is adverse to the same.

Petitioners further show that there is drawn in question the validity of an authority exercised under the State of Louisiana, to wit, the validity of the assessment complained of in plain-
28 tiffs' petition, which plaintiffs claim is unconstitutional, null, and void because repugnant to and violative of paragraph 2 of section 10 of article 1 of the Constitution of the United States, and that said decision of this court is in favor of the validity of said assessment.

That there is involved herein the construction of said provision of the Federal Constitution, and the decision of the court turned wholly upon the construction of said provision of the Federal Constitution, which this court by its said judgment construed adversely to your petitioners, dismissing plaintiffs' suit and maintaining as

valid the said assessment complained of, and that if the court had adopted plaintiffs' construction of said provision of the Federal Constitution its decision would have been in favor of your petitioners and decreeing said assessment to be unconstitutional, null, and void.

That this court is the highest court of this State in which a decision of the question involved herein could be rendered.

Wherefore petitioners pray that they be granted a writ of error to operate as a supersedeas, returnable to the Supreme Court of the United States within thirty days from this date, upon plaintiffs giving bond, conditioned as the law directs, in the sum of 200 dollars, and that the injunction heretofore issued in this cause be continued in force, and they pray that defendants may be duly cited.

(Signed) GURLEY & MELLEN,
Att'ys for Pl'ffs, F. May & Co.

Order.

NEW ORLEANS, *May* 24, 1899.

The foregoing petition and assignment of errors filed therewith, being considered the writ of error as prayed for, is allowed & to operate as a supersedeas upon plaintiffs giving bond, conditioned as the law directs, in the sum of two hundred dollars, and the injunction heretofore issued herein against the treasurer of the city of New Orleans is continued in force.

(Signed) FRANCIS T. NICHOLLS,
Chief Justice of the Supreme Court of the State of Louisiana.

MAY 31, 1899.

Service of citation waived & notice hereof taken.

(Signed) W. B. SOMMERVILLE,
Of Counsel for the City of New Orleans.

(Endorsed:) No. 12957. Supreme court of Louisiana. F. May & Co. *vs.* City of New Orleans. Petition for writ of error. Filed May 24, 1899. (Signed) T. McC. Hyman, clerk.

29 *Assignment of Errors.*

Filed May 24th, 1899.

F. MAY & Co.
vs.
CITY OF NEW ORLEANS. } No. 12957.

Now come F. May & Co., plaintiffs herein, and make and file with their petition for writ of error herein the following assignment of errors:

1. The court erred in holding that the burden of proof is on plaintiffs, resisting the assessment and asserting exemption, to show that no part of their stock of merchandise is of the character rendering it subject to taxation, and that no portion of their credits or bills receivable were for goods sold which were subject to taxation.

2. The assessment complained of being of imports and bills receivable for imports sold, the court erred in holding that the burden of proof was not on the city of New Orleans to show that it was exempt in this case from the prohibition contained in paragraph 2, section 10, of article 1 of the Constitution of the United States.

3. The court erred in not holding that when the property assessed was shown to be imports and bills receivable for imports sold by plaintiffs the burden of proof was shifted from plaintiffs to the defendant, The City of New Orleans, to show that it was exempt in this case from the prohibition contained in said provision of the Federal Constitution.

4. The court erred in holding that goods taken from the cases in which shipped and received by the importer, even though still remaining in the manufacturer's packages, become incorporated into the general mass of property of the State and subject to its tax laws.

5. The court erred in holding that the mere removal by plaintiffs of the manufacturer's packages from the wooden case in which a great number of them were packed merely for convenience of shipment destroyed the distinctive character as imports of the goods contained in said packages, although said packages remained intact and just as put up by the foreign manufacturer, and that after said packages were taken out of said wooden cases the goods therein contained and still unsold were no longer imports within the meaning of said provision of the Federal Constitution, but became at once subject to State and municipal taxation.

6. The court erred in holding that the case, box, or covering in which the packages put up by the manufacturer abroad were packed for shipment to plaintiffs was the original package of imports, and that as soon as the said case, box, or covering was opened and the manufacturer's packages taken therefrom the goods, though yet unsold, became incorporated with the general mass of property in the State and subject to its tax laws, although the goods were never sold by the case, box, or covering in which shipped, but were sold only by the package as put up by the manufacturer, in which form they were intended to be sold.

7. The court erred in holding that the packages of goods put up by the foreign manufacturer for use in the trade in that form and intended to be sold in that form and actually sold only in that form, in unbroken packages, were not the original packages of imports within the meaning of said provision of the Federal Constitution, when a number of said packages were put up by the foreign manufacturer in a large wooden case or box for the convenience of shipment.

8. The court erred in holding that the assessment complained of was valid, although the goods assessed and upon which plaintiffs had paid customs duties to the United States remained in the original packages as put up by the foreign manufacturer for use in the trade in that form and were intended to be sold and were sold

only in that form, to wit, in the unbroken original manufacturer's packages.

9. The court erred in holding that said imported goods were subject to State and municipal taxation while remaining in the hands of plaintiffs, the importers, in the original packages as put up by the foreign manufacturer.

10. The court erred in holding that said assessment of "bills receivable," etc., was valid, although said bills receivable consisted wholly of balances due on sales of said imported goods in the original packages as put up by the foreign manufacturer.

11. The court erred in rendering judgment herein against plaintiffs.

31 12. The court erred in rendering judgment herein in favor of defendants.

Wherefore, because of the errors hereinabove assigned and other errors apparent on the face of the record, plaintiffs pray that the said judgment and decree be reversed, and that there be judgment in their favor decreeing said assessment to be unconstitutional, null, and void, and making the injunction herein perpetual; they pray for costs and for all and general relief.

(Signed) GURLEY & MELLEN,
Att'ys for Pl'ffs, F. May & Co.

(Endorsed:) No. 12957. Supreme court of Louisiana. F. May & Co. *vs.* City of New Orleans. Assignment of errors. Filed May 24, 1899. (Signed) T. McC. Hyman, clerk.

Copy of Writ of Error.

Filed May 24th, 1899.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between F. May & Company and the City of New Orleans, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of the clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was

32 against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution,

treaty, statute, or commission, a manifest error hath happened, to the great damage of the said F. May & Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you. if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the said Supreme Court, the 24 day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

(Signed) E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
FRANCIS T. NICHOLLS,
Chief Justice of the Supreme Court of the State of Louisiana.

(Endorsed:) No. 12957. Supreme court of La. F. May & Co. *versus* City of New Orleans. (Writ of error.) Copy of writ of error lodged in the clerk's office of the supreme court of Louisiana, in pursuance of the statute in such cases made and provided, this 24th day of May, one thousand eight hundred and ninety-nine. (Signed) Gurley & Mellen, attorneys of plaintiff in error. Filed May 24, 1899. (Signed) T. McC. Hyman, clerk.

Bond for Writ of Error.

Filed May 24th, 1899.

33 Know all men by these presents that we, F. May & Company, as principal, and William Henry, as surety, are held and firmly bound unto the City of New Orleans in the full and just sum of two hundred dollars, to be paid to the said City of New Orleans, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the supreme court of Louisiana, in a suit depending in said supreme court, wherein F. May & Company are plaintiffs and The City of New Orleans is defendant, judgment was rendered against the plaintiffs and in favor of the defendant, and

the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said F. May & Company shall prosecute this writ to effect and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) F. MAY & CO.,
By D. C. MELLEN, [L. S.]
Their Att'y.

Do. WM. HENRY. [L. S.]

Sealed and delivered in the presence of—
(Signed) T. McC. HYMAN.

UNITED STATES OF AMERICA, } ss:
State of Louisiana, }

Personally appeared William Henry, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the city of New Orleans, State of Louisiana, and is worth the full sum of two hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) WM. HENRY.

34 Subscribed and sworn before me, at the city of New Orleans, this 24th day of May, 1899.

(Signed) T. McC. HYMAN,
[SEAL.] *Clerk of the Supreme Court of the State of Louisiana.*

(Endorsed:) No. 12957. Supreme court of the State of Louisiana. F. May & Co. *vs.* City of New Orleans. Bond for writ of error. Filed May 24, 1899. (Signed) T. McC. Hyman, clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA, }
State of Louisiana. }

Supreme Court of the State of Louisiana.

I, Thomas McCabe Hyman, clerk of the supreme court of the State of Louisiana, do hereby certify that the foregoing thirty-four pages contain a full, true, and complete copy of the proceedings had in the civil district court for the parish of Orleans in a certain suit wherein F. May & Company were plaintiffs and The City of New Orleans was defendant, and also of all the proceedings had in this supreme court on the appeal taken by said plaintiffs, which appeal is now on the files thereof under No. 12957.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this fifth day of June, anno Domini one thousand eight hundred and ninety-nine, and in the one hundred and twenty-third year of the Independence of the United States of America.

Seal Supreme Court of the State of Louisiana.

T. McC. HYMAN, *Clerk.*

35 *Certificate of the Chief Justice.*

I, Francis Tillou Nicholls, chief justice of the supreme court of the State of Louisiana, do hereby certify that Thomas McCabe Hyman is clerk of the supreme court of the State of Louisiana; that the signature of Thomas McCabe Hyman to the foregoing certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this the fifth day of June, anno Domini one thousand eight hundred and ninety-nine.

Seal Supreme Court of the State of Louisiana.

FRANCIS T. NICHOLLS,
Chief Justice.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between F. May & Company and the City of New Orleans, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of the

37 clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said F. May & Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24 day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by—
FRANCIS T. NICHOLLS,
Chief Justice of the Supreme Court of the State of Louisiana.

38 [Endorsed:] No. 12957. Supreme court of La. F. May & Co. *versus* City of New Orleans. Writ of error. Filed May 24, 1899. T. McC. Hyman, clerk.

Endorsed on cover: File No., 17,446. Louisiana supreme court. Term No., 332. F. May & Company, plaintiffs in error, *vs.* The City of New Orleans. Filed June 24, 1899.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1899.

No. 332.

F. MAY & CO., PLAINTIFFS IN ERROR,

versus

CITY OF NEW ORLEANS,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

STATEMENT OF THE CASE.

F. May & Co., importers, were assessed in 1897 on "merchandise and stock in trade" at $2,500, and on "bills receivable", etc., at $1,000.

This suit was instituted in the Civil District Court for the Parish of Orleans, Louisiana, to have said assessments decreed to be unconstitutional, null and void, because their merchandise and stock in trade consisted wholly of imported goods upon which they paid the required duties to the United States, and which they sold only in the original packages, and their only "bills receivable" were sums due on account of sales of said imported

goods. For these reasons plaintiffs claim that said assessments were levied in violation of Article 1, section 10, paragraph 2, of the Constitution of the United States, which provides that "no State shall, without the consent of Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The City filed a general denial in answer to the petition. The judgment of the lower Court was in favor of plaintiffs and the City appealed. The Supreme Court of the State reversed the judgment and dismissed the suit, and plaintiffs brought the case up to this Honorable Court on writ of error, and made the following assignment of errors:

1. The Court erred in holding that the burden of proof is on plaintiffs, resisting the assessment and asserting exemption, to show that no part of their stock of merchandise is of the character rendering it subject to taxation, and that no portion of their credits or bills receivable were for goods sold which were subject to taxation.

2. The assessment complained of being of imports and bills receivable for imports sold, the court erred in holding that the burden of proof was not on the city of New Orleans to show that it was exempt in this case from the prohibition contained in paragraph 2, section 10, of article 1 of the Constitution of the United States.

3. The court erred in not holding that when the property assessed was shown to be imports and bills receivable for imports sold by plaintiffs the burden of proof was shifted from plaintiffs to the defendant, the City of New Orleans, to show that

it was exempt in this case from the prohibition contained in said provision of the Federal Constitution.

4. The court erred in holding that goods taken from the cases in which shipped and received by the importer, even though still remaining in the manufacturer's packages, become incorporated into the general mass of property of the State and subject to its tax laws.

5. The court erred in holding that the mere removal by plaintiffs of the manufacturer's packages from the wooden case in which a great number of them were packed merely for convenience of shipment destroyed the distinctive character as imports of the goods contained in said packages, although said packages remained intact and just as put up by the foreign manufacturer, and that after said packages were taken out of said wooden cases the goods therein contained and still unsold were no longer imports within the meaning of said provision of the Federal Constitution, but became at once subject to State and municipal taxation.

6. The court erred in holding that the case, box, or covering in which the packages put up by the manufacturer abroad were packed for shipment to plaintiffs was the original package of imports, and that as soon as the said case, box or covering was opened and the manufacturer's packages taken therefrom the goods, though yet unsold, became incorporated with the general mass of property in the State and subject to its tax laws, although the goods were never sold by the case, box, or covering in which shipped, but were sold only by the package as put up by the manufacturer, in which form they were intended to be sold.

7. The court erred in holding that the packages of goods put up by the foreign manufacturer

for use in the trade in that form and intended to be sold in that form and actually sold only in that form, in unbroken packages, were not the original packages of imports within the meaning of said provision of the Federal Constitution, when a number of said packages were put up by the foreign manufacturer in a large wooden case or box for the convenience of shipment.

8. The court erred in holding that the assessment complained of was valid, although the goods assessed and upon which plaintiffs had paid customs duties to the United States remained in the original packages as put up by the foreign manufacturer for use in the trade in that form and were intended to be sold and were sold only in that form, to-wit, in the unbroken original manufacturer's packages.

9. The court erred in holding that said imported goods were subject to State and municipal taxation while remaining in the hands of plaintiffs, the importers, in the original packages as put up by the foreign manufacturer.

10. The court erred in holding that said assessment of "bills receivable," etc., was valid, although said bills receivable consisted wholly of balances due on sales of said imported goods in the original packages as put up by the foreign manufacturer.

11. The court erred in rendering judgment herein against plaintiffs.

31 12. The court erred in rendering judgment herein in favor of defendants.

Plaintiffs are importers and deal in nothing but imported goods which they have manufactured abroad. Most of their business is done upon import orders, i. e. they take orders from samples for certain goods to be manufactured and they send

these orders to the foreign manufacturer. These goods, being already sold, are delivered immediately after their arrival to the respective purchasers and do not form a part of their stock in trade. The rest of their business consists of sales made from their stock which is composed wholly of unbroken original packages as put up at the foreign factories and which they sell only in that form and also from samples, never seeing the goods inside of the packages.

All goods are put up at the foreign factories in packages of certain kinds and sizes according to the nature of the goods and the demands of the trade; for instance, towels are put up in packages of 4 dozens to a package, and lace-edging in pasteboard boxes, each box containing a gross or 144 yards. These packages are not shipped separately by the manufacturer, but, for convenience of shipment, a number of them is put into a large wooden case. If this case contains goods for only one customer it is delivered unopened, after the payment of duties. But if it contains goods for two or more persons, then it has to be opened and the goods separated. And so a case containing goods for plaintiffs' stock is also opened and the packages are taken out. But these packages are never broken or opened, the wrapper and the twine being left intact, and no sale is ever made of a less quantity than a package.

ARGUMENT.

The first three assignments of error raise the question as to the burden of proof. The other assignments all deal with practically the same question, that is, whether the removal of the manufacturer's packages or trade-packages from the large shipping case did away with the prohibition of Article 1, Section 10, paragraph 2, of the Federal Constitution against the States' taxing imports and so took the goods out of the protection of that provision.

We will therefore divide the argument into two heads.

I.

AS TO THE BURDEN OF PROOF.

It may be said that this is a mere hypothetical question and of no practical value, since the facts have all been proved. We, however, do not assent to this view, for, if after considering the evidence there should be any doubt whatever, that doubt should be resolved against the party on whom the burden of proof rested to prove his case.

Now, applying the universal rule that the burden of proof is on the party who claims to be exempt from the operation of a particular law (in this case, paragraph 2 of Section 10 of Article 1 of the Constitution of the United States), it is clear that so soon as it was established that the goods

assessed were imports, the burden was shifted to the City to show that plaintiffs had done some act after importation which destroyed the distinctive character of the goods as imports and *exempted* it from the constitutional prohibition against the States' taxing imports. In other words, the City claiming to be exempt from the constitutional prohibition, because the goods, when assessed, had lost their distinctive character as imports (an affirmative) by reason of an act or of acts done by the importer (another affirmative) must show these facts.

It was not incumbent on plaintiffs to show that the goods had not lost their distinctive character as imports. The goods are presumed to retain their original character until proof to the contrary. Hence the burden is upon the City and she must make out a clear case of *exemption from the constitutional prohibition*, and any doubt must be resolved in favor of plaintiffs.

II.

The question to be considered under the remaining assignments of error, 3 to 12 inclusive, is: When do goods imported from abroad become liable to taxation by the State?

Under the provision of the Federal Constitution prohibiting the States from taxing imports, it is clear that they cannot be taxed so long as they retain their distinctive character as imports, and hence, in order to solve the question, we must

ascertain what acts destroy their character as imports.

As was stated by Chief Justice Marshall, in Brown vs. Maryland, 12 Wheat. 442, the leading case on this subject, no fixed rule can be formulated that would be of universal application. Each case must be determined by its own peculiar facts. But the learned Chief Justice laid down this general rule: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the Constitution."

The use of the expression "original package" was merely illustrative, the true test being whether the imported goods had been mixed up with the general property of the State. And this test has been applied ever since by this and other Courts, although the words "original package" have been so generally used that the cases have become known as the "original package" cases.

The License cases, 5 Howard, pp. 575–6.

Leisy vs. Hardin, 135 U. S. 113.

Schallenberger vs. Penn, 171 U. S. p. 1.

Collins vs. New Hampshire, ib. p. 30.
In re Ware, 58 Fed. R. 783.
In re Spain, 47 Fed. R. 208.
State vs. Goetze, (S. C. of Appeals of W. V.) 27 S. E. R. 225.

It is admitted by the learned counsel for defendant in error that the goods would not have been subject to taxation by the State if the packages as put up at the foreign factories had been shipped separately to plaintiffs, but he contends that, as many of these packages were enclosed together in a large wooden case, the goods became liable to State taxation as soon as the packages were taken out of the case and put on the shelves of plaintiffs' store, although the wooden case was used solely for the convenience of shipment and the packages themselves were never broken or opened.

On the other hand, we claim that the goods were not taxable so long as they remained in plaintiffs' hands in these packages, which were the packages as put up at the foreign factories for the trade; that the goods could not be taxed until the manufacturer's package or trade-package was broken, or opened, or sold, in which latter case they would become at once subject to taxation as the property of the purchaser.

The question then to be decided is narrowed down to this: Did the mere removal of the manufacturer's packages from the wooden case wherein they were placed solely for the convenience of

shipment and to lessen the cost of transportation, incorporate the goods with the mass of property of the State and so destroy their distinctive character as *imports* within the meaning of paragraph 2 of section 10 of Article 1 of the Constitution of the United States as to render them subject to the taxing power of the State ?

The Supreme Court of Louisiana answered this question in the affirmative upon the ground that the wooden case and not the manufacturer's package was the "original package."

The Court did not take into consideration the fact that the wooden case was not a commercial package, for plaintiffs never sold the goods by the case, but only by the package in which they were put up by the foreign manufacturer for the trade and in which they were intended to be sold. The manufacturer's package is the trade-package, for that is the form in which the goods are intended for sale and is the original package of imports within the meaning of the various decisions, the outer casing being used only as a protection against damage and for the convenience of handling and to lessen freight. And it seems to us that Chief Justice Taney so thought when he used the following language in the License Cases, 5 H. 575 : "And while they [goods imported] are in the hands of the importer for sale, in the form and shape in which they were introduced, *and in which they are intended to be sold*, they may be regarded as merely *in transitu*, and on their way to the

distant cities, villages and country for which they are destined and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for State purposes, whether by direct assessment or indirectly by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon merchandise when passing through a State. A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if a tax was laid openly and without disguise as a duty on imports. Such a power in the State would defeat one of the principal objects of forming and adopting the Constitution."

The main purpose of prohibiting the States from laying any duty on imports was to put all the States, the sea-bordered and the inland States, on the same footing, for prior to the adoption of the Constitution certain "States having fine harbors imposed unlimited tax on all goods reaching the continent through their ports." Cook vs. Penn., 97 U. S. 574. To effect this purpose the prohibition must be absolute and unqualified, so long as the goods retain their identity as imports and remain separate from other property of the State.

And as was stated in Brown vs. Maryland, and approved by all the later decisions on the subject, the right to import carries with it the right to sell the goods free from all burdens except what might be imposed by the United States. And the right to sell must mean the right to sell the goods in the form in which they are put up abroad for sale, otherwise the right would be valueless to the importer. Knowing the importer to be a merchant the manufacturer puts up the goods in packages of the size and kind customary to the trade in the particular article, because that is the form in which the goods are intended to be sold in the market where the importer is engaged in business. But when the manufacturer is about to ship the goods put up in such packages, it then becomes necessary to transport them to this country at the least possible cost, and this is in the interest of the consumer particularly, for any additional cost must eventually fall on him. To this end the manufacturer procures a box just large enough to contain the number of packages intended for a particular shipment; puts the packages in it, marks it with the proper address and forwards it to its destination. But this outer box or shipping case is in no sense a trade-package, for the goods are never sold by such box or case, and the removal therefrom of the manufacturer's packages in no way destroys their identity as imports or incorporates them with the general property of the State, especially where, as in this case, they are put in the

importer's warehouse or store which contains nothing but imports in similar packages, that is to say, in packages just as they were put up at the factory for sale by the importer.

The decision of the Supreme Court of Louisiana gives the State the power to practically nullify paragraph 2 of Section 10 of Article 1 of the Federal Constitution. It puts it in the power of the State to absolutely dictate to the importer how he must have his goods shipped in order to retain the benefit guaranteed by the Constitution.

If the State may say to the importer: "You must have the manufacturer's packages shipped one by one or I will tax the goods," the importer would be obliged to have the packages put up differently and the expenses of transportation would be greatly increased.

The goods could no longer be put up in paper wrappings and paste-board boxes, as is customary, but each package would have to be made fit for transportation, that is, practically damage-proof, which alone, leaving out of consideration the extra freight that would naturally be charged, would probably add more to the cost of the goods than the tax would be. And thus placed between two evils and being driven to the necessity of choosing the lesser, the importer would be compelled to pay an unjust tax, for it is to his interest and to the interest of the consumer in particular for whose benefit the States were prohibited from laying a tax on imports, that the goods should be sold as

cheaply as possible. Such an arbitrary exercise of power on the part of the State is not only repugnant to paragraph 2 of Section 10 of Article 1 of the Constitution but is equally repugnant to paragraph 3 of Section 8 of said Article, which gives Congress the power to regulate commerce with foreign nations. How is the State any more concerned with how the packages should be temporarily encased for shipment than with the kind of vessel to which they should be delivered for transportation? If the State can require that each package shall be shipped separately, then it seems clear to us that it could with equal propriety say that the goods must be shipped by an English vessel, or by a German vessel, or by a French vessel, or in a steam vessel or a sailing vessel. And no one would have the boldness to assert that any such arbitrary power rests in the State.

We submit that the goods when assessed had not been incorporated or mixed up with the general property of the State and had not lost their distinctive character as imports; that the manufacturer's package, which was the trade-package, and not the wooden box which was a mere shipping case, is the original package of imports within the meaning of the Constitution.

The assessment of the stock in trade is therefore unconstitutional and the assessment of the "bills receivable" which consisted wholly of sums due on account of sales of said stock is for the same reason unconstitutional.

The judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted,

D. C. MELLEN,

J. WARD GURLEY,

Counsel for Plaintiffs in error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 332.

F. MAY & CO., PLAINTIFFS IN ERROR,

versus

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

In Error to the Supreme Court of Louisiana, No. 12,957.

STATEMENT OF CASE.

F. May & Co. are located at No. 136 Chartres street, in the city of New Orleans. They are engaged in importing dry goods, *etc.* Their merchandise, or stock in trade, was assessed for State and municipal taxation in the year 1897 for $2500, and their bills receivable were assessed for the same purposes at $1000. F. May & Co. asked that these assessments be cancelled, on the ground that the taxes based upon the assessment are ~~interferences with importing commerce~~ duties upon imports.

F. May & Co. receive large consignments of goods which are not taken to No. 136 Chartres street, and which are shipped direct from a warehouse to their several customers. Such goods are not assessed, and this suit does not effect them in any way. The exemption from taxation of such goods is recognized by the State and City authorities. The cause depends entirely on the question whether the Legislature of a State can constitutionally require the importers of foreign

articles to pay a property tax upon certain property *after* the cases in which such merchandise has been packed are broken and the property removed therefrom. The stock of goods of F. May & Co. at No. 136 Chartres street is on the shelves of the store there located, and it is not in the original cases in which it has been received by F. May & Co.

It is contended, on behalf of the City of New Orleans, defendant in error, that the breaking of the cases in which the goods were imported and received, and the removal of the goods from the cases, have had the effect of so mingling that merchandise with the mass of the property in the State, as to withdraw it from under the protection of ~~the commerce clause~~ of the Constitution of the United States.

Argument.

Mr. Chief Justice Marshall, in *Brown vs. Maryland*, 12 Wheat., 441 and 442, says:

> There must be a point of time when the prohibition ceases and the power of the State to tax commences; we can not admit that this point of time is the instant that the articles enter the country. * * * It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of the property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the State; and, while remaining the property of the importer in his warehouse *in the original form or package in which it was imported*, a tax upon it is too plain a duty on imports to escape the prohibition in the Constitution.

Has the point of time, when the prohibition ceases to protect the merchandise assessed in this case, and the power of the State to tax it, commenced?

The Court say that this point is not the instant that the articles enter the country. It is at some subsequent point of time. It is submitted that the Court, in *Brown vs. Maryland*, clearly lays down the doctrine that the point of time has arrived when the importer breaks up the original packages

for the purposes of sale or for use, or changes the form in which they were imported, or when they pass to second hands. When any one of these things is done the merchandise loses its distinctive character as imports and becomes subject to the taxing power of the State.

The evidence in the record abundantly shows that F. May & Co. are in the habit of importing goods which have been packed in cases for the purpose of shipment; that they take some of those cases to their store at No. 136 Chartres street, where the cases are broken and the goods therein contained are delivered to their various customers. The testimony on this point is to be found on pages 6 *et seq.* of the transcript of record, and is in part as follows:

> Q. Will you please state what was the business of your firm in 1897?
>
> A. Our business was this: we go to Europe and call on the different manufacturers there, obtaining from them samples which they send to us here in New Orleans; with those samples we call upon the trade of New Orleans and other cities and take on those samples what is known as import orders. These orders we then forward to the different manufacturers in Europe and the goods are shipped to us; those are what are known as import orders. Besides that, if we think any article is good we place what is known as stock orders; that is, we order goods from there for our own account. * * * *
>
> Q. And when you go to deliver those towels do you break any of the packages in that wooden case?
>
> A. Five hundred dozen towels would represent 100 packages of five dozen in each package. Now, some of the cases containing such goods may not come to the store at all; the cases may go right to the customer unopened. *But if there are in that case two or three orders, then we bring the case to the store and open it and take out the different orders;* but we never open any of the packages in the case. * * *
>
> Q. This book I now show you is your own book?
>
> A. That is my own order book. Here is an order from Leon Godchaux for thirteen thousand yards of coating; these goods were ordered to be shipped to New York City; they never came to our store. Now, there is an-

other order—we never even opened that case. *We never open a case unless there happens to be in the same case goods intended for different customers, then we bring the case to the store, open it and separate the goods for the different customers.*

* * * * * * *

Q. What is the percentage of your business, consisting of import orders?

A. That would be hard to say exactly; I would say that 60 or 65 per cent. of our business is done by orders. Of course, some goods in stock are sold to some parties who give us orders, jobbers in New Orleans, Cincinnati and other cities.

Q. Those goods are sold in the same way?

A. Yes; only *they have been taken out of the cases and put in stock.* * * *

Q. Then the goods that come to you are the goods of F. May & Co.?

A. Yes.

Q. I see here an order for twenty-five gross of lace edging; does that twenty-five gross of lace edging compose a complete and original package?

A. Yes—I will explain that—a gross consists of twelve pieces of lace and each piece is twelve yards; twelve pieces of twelve yards each are put in a box and there is paper around that box, and twine tied around the paper. And that is what I consider an original package; twenty-five gross would represent twenty-five packages.

Q. They are put in cartoon or paper boxes?

A. Yes.

Q. And those cartoons or paste-board boxes are put into another box?

A. They are put in a case. * * * If one case contains only one order, we send the case directly to the man who gave the order; *if it happens to contain two or three orders it comes to the store; the case is opened and the orders separated.*

* * * * * *

Q. Look at the next order—what does that represent?

A. That would represent two cartoons of lace, not enough to make a case.

Q. That is, two small paper board boxes of lace?

A. Yes.

Q. Did you receive those two boxes of lace just as you sold them, or did they come in a case?

A. They came in a case with another order.

Q. Now, look at the one next to that?

A. That also came in a cartoon.

Q. And that cartoon was with other cartoons in a large case?

A. Yes.

Q. And the next one?

A. The same reply applies to that.

Q. None of these cartoons came to you, except put together with other cartoons in a large case?

A. Yes.

Q. And the next one?

A. The same reply applies to that.

Q. None of these cartoons came to you, except put together with other cartoons in a large case?

A. They all came in a case, and the whole case might not have been intended for one customer.

Q. It was not always so in 1897, that the goods in one case went to one customer?

A. No.

Q. Different articles came in the same case, intended for different customers, and you opened the cases and delivered the articles to the different customers?

A. Yes; but one case contains only lace, another towels, another bobbinet, *etc.* * * * *

Q. How would you do with your stock goods?

A. Anything we have in stock we sell.

Q. What do you mean by stock?

A. Suppose a man was to come in the store to buy bobbinet; we explain to him that he would have to buy at least one package; that we would not sell one piece only; that we only sold in packages; we have packages of two, three, and four, in each package.

Q. And those packages are put in a larger case, of how many in each case?

A. That varies—30, 40 or 50 * * * bobbinets would come in a case, but we don't sell them by the case. * * *

Q. But these packages were in stock—they were on the shelves of your store?

A. Yes, in the original packages—what I consider the original packages. * * *

Q. Now, what credits or bills receivable were there of your firm in 1897?

A. Our bills receivable consisted of simply money due to us by customers who had given orders that had been filled, and which they had not paid for. * * * * We had bills receivable only.

Q. And they were what you have just stated—money due you upon imported goods sold by you?

A. Yes.

Q. Some of which goods were sold in those cartoons as you describe, and not in the original packages?

A. Some of which were sold out of stock and some on import orders.

Q. I want to get a thorough explanation of the way you get these goods; say a dozen or more packages of goods are shipped by the manufacturer in a wooden box for convenience; as I understand, many of those cases go direct to your customers?

A. A great many.

Q. And in other cases, where they contain more than one order, the cases are opened by you and the orders separated?

A. Yes; but the order is generally sent in the case itself, the goods may be shipped in a wrapper, by express; the case does not signify that that is an original package; the original package is the one in which the goods are put up at the manufactory. If a manufacturer puts up five dozen towels in a package that package is the original package, and if I open that package I break the original package; but whether he puts those packages in a case or not, it remains in the original package. The original package is the original wrapper put around the goods at the factory, and is known as such in the trade.

The Supreme Court of Louisiana hold that the breaking of the cases in the manner indicated in the record is such a change of the form in which those cases of goods were imported, that they have lost their distinctive character as imports, and that the assessment and taxation thereof were constitutional and valid.

This is, it is submitted, in strict line with the decisions of the Court in *Brown vs. Maryland* and *Low vs. Austin*, 13 Wallace, 34. The Supreme Court of Louisiana, under these decisions, in deciding that the State of Louisiana could not impose a license tax upon the business carried on by Gelpi & Bro., importers, held that:

> A package means a bundle put up for transportation or commercial handling. It is a thing in form to become, as such, an article of merchandise for transportation or

delivery from hand to hand. *United States vs. Goldback*, Hughes Reps., Vol. 1, page 528. The breaking or destroying entirely of the package is a *clear* definition which does not admit of comment. *State ex rel. Gelpi & Bro. vs. Board of Assessors et al.*, 46 An. 147.

The same rule of construction is laid down by the Supreme Courts of the several States, as well as by the Federal Courts, in passing upon questions of commerce between the States.

The authority for such application is laid down in *Brown vs. Maryland*, page 449, in the following language:

> It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State.

In *Guckenheimer et al. vs. Sellers et al.*, 81 Fed. Rep., 997, Judge Simonton says:

> It appears that the original package is the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped. If in single bottles, shipped singly, or if in packages of three or more securely fastened together, and marked, or if in a box, barrel, crate or other receptacle, the single bottle, in the one instance, the barrel, box, crate, or other receptacle, respectively constitute the original package. * * * If the package be broken after such delivery it comes within the police regulations of the State.

In *State-Cochran vs. Winters*, 44 Kansas, 723, 10 L. R. A., it is said:

> The original package * * * was and is the package * * * as it existed at the time of its transportation from one State to the other.

In *McGregor vs. Cone*, Lawyers' Reports, Annotated, No. 39, page 484, Chief Justice Deemer of the Iowa Supreme Court, in defining an original package, says:

> All the cases agree that once the article is sold by the importer it then becomes subject to the taxing and police power of the State; and it is quite generally held that the

same result occurs when the original package in which it is imported is broken and the several parcels are so mingled with other property, or so exposed for sale as to destroy the identity of the package as imported. * * * What is an original package. The definition commonly accepted and believed by us to be correct, is that it is a bundle, put up for transportation or commercial handling and usually consists of a number of things bound together, convenient for handling and conveyance. * * * It is quite apparent, we think, that the words original package have reference to a unit which the carrier receives, transports and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form, or broken and transformed, it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce and no longer enjoys its protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the State and is subject to the laws of that State passed in virtue of its police powers. * * * (With reference to the Coonan case in Iowa, Mr. Chief Justice Deemer says): We have already seen that the Collins case should not be regarded as authority upon the proposition involved, and an examination of the *Beine* case will disclose that it does not hold to any such rule. The contrary seems to be the holding in that case. * * * We are abidingly convinced that the *Coonan case*, if it holds to the doctrine contended for by the appellant, is wrong, and ought to be overruled; and insofar as it may be said to be out of harmony with this opinion and the great weight of reason and authority, it is over-ruled.

In *Keith vs. State* (*Ala.*), 10 L. R. A., 430, it was held:

That when intoxicating liquors are imported in small bottles, each of which is wrapped in paper and labeled "original package," the bottles being packed, for the purpose of facilitating the shipment, in an open box

marked with the number and size of the bottles contained therein, the box, and not the bottle, is the original package.

It is submitted that the assessment complained of by F. May & Co., of their merchandise, located in their store at No. 136 Chartres street, not in the original packages or cases in which it was imported, as well as the assessment of bills receivable for like stock which had been sold, are good and valid assessments; and that the judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

SAM'L L. GILMORE,
City Attorney.

W. B. SOMMERVILLE,
Assistant City Attorney,

Of Counsel for the City of New Orleans, Defendant in Error.

New Orleans, December 20, 1899.

MAY *v.* NEW ORLEANS.

No. 332. Argued March 6, 7, 1900. — Decided May 21, 1900.

May & Co., merchants at New Orleans, were engaged in the business of importing goods from abroad, and selling them. In each box, or case in which they were brought into this country, there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. *Held:*

(1) That the box, case or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and when it reached its destination for trade or sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles, the goods lost their distinctive character as imports and each parcel or bundle became a part of the general mass of property in the State and subject to local taxation;

(2) That *Brown* v. *Maryland*, 12 Wheat. 419, established these propositions: 1. That the payment of duties to the United States gives the right to sell the things imported, and that such right *to sell* cannot be forbidden or impaired by a State; 2. That while the things imported retain their character as imports, and remain the property of the importer, "in his warehouse, in the original form or package in which it was imported," a tax upon it is a duty on imports within the meaning of the Constitution; 3. That a State cannot, in the form of a license or otherwise, tax the right of the importer *to sell*, but when the importer has *so acted upon* the goods imported that they have been incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character as imports, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the State in like condition with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate.

Opinion of the Court.

THE case is stated in the opinion of the court.

Mr. D. C. Mellen for plaintiffs in error. *Mr. J. Ward Gurley* was on his brief.

Mr. W. B. Sommerville for defendant in error. *Mr. Samuel L. Gilmore* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiffs in error, a commercial firm in New Orleans, brought this action in the Civil District Court, Parish of Orleans, to prevent the enforcement of certain tax assessments made by the city of New Orleans in the year 1897.

The petition alleged that during the whole of the year 1897 the plaintiffs were engaged in importing for sale foreign goods upon all of which they paid the duties and imposts levied by the United States;

That the Board of Assessors for the Parish of Orleans assessed them for that year $2500 on "merchandise and stock in trade," and $1000 under the head of "money loaned on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description;" and,

That such assessments were void for the following reasons: 1. All merchandise and stock in trade had and carried by the plaintiffs during 1897 consisted of dry goods imported by them from foreign countries upon which duties, imposts and import taxes were levied by the United States and paid by them, and which were sold only in unbroken original packages as imported, and the assessment thereon was in violation of Article 1, section 10, paragraph 2, of the Constitution of the United States. 2. All the credits and bills receivable of the firm during that year consisted wholly of sums due on the purchase price of the above merchandise sold in unbroken and original packages as imported, and the assessment thereon was in violation of the same constitutional provision. 3. The assessment of $1000 upon "money loaned on interest" was unconstitutional,

because the plaintiffs at no time during 1897 had any money loaned on interest.

A temporary injunction having been granted against any sale of the plaintiffs' property for the taxes in question, the city answered denying each allegation of the petition.

The only evidence in the case was the testimony of one of the plaintiffs as to the manner in which the company conducted its business. That testimony—using substantially the words of the witness—may be thus summarized:

Representatives of the firm went to Europe and obtained from different manufacturers samples of goods which were sent to New Orleans and were used by plaintiffs in obtaining what were known as import orders. Besides that method, if any article was thought good they placed what were known as stock orders—that is, they ordered the goods on their own account. But in most cases the firm sold the goods and did not keep a stock on hand. All their goods were imported and customs duties were paid on them. They did not handle domestic goods.

They sold the goods in the packages in which they were received because the bulk of their business was jobbing trade. Two, three or five hundred packages might be ordered. If the order were for five hundred dozen towels, they might come packed two, three or five dozen in a package. Such a package was never broken. If a small customer came in they might sell him one package. It had often happened that customers desired only a sample, in which case a package might be broken to get it. Upon these samples the importers obtained orders. If an order was given for five hundred dozen towels, put up in packages of five dozen each when shipped to the firm by the manufacturer in Europe, they would be enclosed in a wooden case. Cases containing such orders might not come to the firm's store at all but would go directly to the customer unopened. But if there were two or three orders in a case it would be brought to the store, opened, and the different orders taken out. But they never opened any of the packages in the case.

An import order was one placed on samples to be manufactured, and about sixty-five per cent of the firm's business was

done by import orders. They would submit to the buyer a line of samples and he would give an import order with the understanding that the goods ordered were to be manufactured and the delivery of them not made for three or four months. If he placed a stock order it was for goods that were in the store ready for delivery.

Goods were always ordered on the firm's own account. They might receive an order for two hundred dozen towels, but give an order on the manufacturer for five hundred dozen, for three hundred of which they had no order but which they might sell while in process of manufacture. They were the owners of all goods that came to them upon those orders.

The lace handled by them was put up in cartons or pasteboard boxes, each box containing twelve pieces of lace, each piece twelve yards long. In filling orders a number of these cartons or boxes were put in another box or case by the manufacturer and so received by the firm. If a case contained only one order it was sent directly to the customer. If the case happened to contain two or more orders it went to the store, where it was opened and the orders separated.

Bobbinet was received in cases containing thirty, forty or fifty packages of two, three or four pieces each. If a customer wished to buy bobbinet, he was told that he would have to buy at least one package; that they did not sell one piece only but in packages. The bulk of the business in bobbinet was directly on import orders. At times six, seven or eight cases which did not come to the store were sold to one firm. Bobbinet was not sold by the case. If more than one order came in a case it was broken open and the orders separated.

The stock of the firm consisted mostly of bobbinet and household linens. They also kept a number of samples of dolls and toys, household linens, towels, sheets, embroideries and laces.

We here give a part of the examination of the witness: "Q. Some of which goods were sold in these cartons as you describe and not in the original packages? A. Some of which were sold out of stock and some on import orders. Q. Let us make that clear. I understand you to say — let us take this case of cartons of laces. You may order such a quantity of

laces as would consist of, say, fifty cartons, and the factory ships them to you in a large wooden box? A. The packer does that. The manufacturer does not even put them in a case himself, but gets the packer to do that; and there are certain goods not in the lace line, but in the household linen line, which do not come in cases; they come in bales. Q. I want to get a thorough explanation of the way you get at these goods. Say a dozen or more packages of goods are shipped by the manufacturer in a wooden box for convenience, as I understand many of these cases go direct to your customers? A. A great many. Q. And in other cases, where they contain more than one order, the cases are opened by you and the orders separated? A. Yes; but the order is generally sent in the case itself. The goods may be shipped in a wrapper by express. The case does not signify that this is the original package. The original package is the one in which the goods are put up at the factory. If a manufacturer puts up five dozen towels in a package that package is the original package, and if I open that package I break the original package; but, whether he puts those packages in a case or not, it remains in the original package. The original package is the original wrapper put around the goods at the factory, and is known as such in the trade."

In reference to "Money loaned on interest, all credits and all bills receivable, money loaned and advanced or for goods sold, all credits of any and every description" in the assessment, the witness said that the only property possessed by the firm in 1897 of the kind mentioned in those items were bills receivable. Those bills consisted of money due them on sales of imported goods by customers who had given orders which had been filled but for which they had not paid. Some of these goods were sold out of stock and some on import orders. They had no money loaned on interest in 1897. The firm was continuing to do business in 1898 in the same way as in the previous year.

Upon final hearing the Civil District Court adjudged that the assessment in question was unconstitutional and void, and the injunction against the city was made perpetual. That judgment having been reversed upon appeal with directions to dissolve the injunction and dismiss the petition, the contention

here is that the plaintiffs in error have been denied rights and immunities secured to them by the Constitution of the United States.

The Supreme Court of Louisiana, speaking by Mr. Justice Blanchard, said, among other things: "The question, then, which the case really presents is, what is the 'original package'? Is it the package in which the goods are put up for convenience by the foreign manufacturer, or is it the case, the box, the covering in which the goods so put up by the manufacturer are packed for shipment? Is the manufacturer's package the original package in legal interpretation, or must that be held to be the original package which is delivered to the carrier for transportation to the desired destination? If the package put up by the manufacturer be the original package, then plaintiffs' objection to the assessment complained of is well taken. If the case or box in which the goods are placed for shipment be the original package, then their case falls." After referring to some of the adjudged cases, the court said that the authorities supported the contention of the city that the "original package" in this case must be held to be that in which the goods were shipped to and received by the plaintiffs and not the smaller packages put up by the manufacturer and packed in the box delivered to the carrier.

If the goods of the plaintiffs were assessed for taxation before they had ceased to be imports, that is, while in the original packages and before they had, by the act of the importer, become incorporated into the mass of property of the State and were held for use or sale, then the assessment was void under the provision of the Constitution of the United States declaring that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except those absolutely necessary for executing its inspection laws, as well as under the provision giving Congress power to regulate commerce with foreign nations. Art. 1, §§ 8, 10. Of the correctness of this general proposition, as sustained by the adjudged cases, no doubt is entertained.

Two views of the general question are presented for our consideration.

One is, that the box, case or bale in which the plaintiffs' goo were brought from Europe was not the original package; th each separate parcel or bundle placed in each box, case or b was itself an original package; and that within the meaning the Constitution no one of such separate parcels or bundles l its distinctive character as an import and became part of mass of property in the State, liable to local taxation, until af that separate parcel or bundle had been sold by the importe This is substantially the proposition pressed upon our attent by the plaintiffs.

The other view is that the box, case or bale in which separate parcels or bundles were placed by the foreign sel manufacturer or packer was to be regarded as the original pa age, and that upon the opening of such box, able or case the purpose of using or exposing to sale such separate parc or bundles, each parcel or bundle lost its distinctive charac as an import and became a part of the general mass of prope in the State subject to local taxation. This is the proposit advanced on behalf of the defendant.

Let us first inquire as to the consequences that may foll from the interpretation of the clause of the Constitution re ing to state taxation of imports upon which the plaintiffs their case. In the view taken by them it would seem to immaterial whether the separate parcels or packages brou from Europe were left in the shipping box, case or bale afte was opened or were taken out and placed on the shelve counters in the store of the importer for delivery or sale al with goods manufactured or made in this country. In ot words, they argue that the importer may sell each sepa package either from the box in which it was transported, a it is opened, or from the shelves or counters in his store, w out being subjected to local taxation in respect of any pack so brought into the country, provided such separate packag sold or offered for sale in the form in which it was when pla in the box, case or bale by the European manufacture or pac This means that the power of the State to tax goods, the duct of other counties, depends upon the particular form which the European manufacturer or packer, of his own acc

or by direction of the importer, has put them up in order to be sent to this country. The necessary result of this position is, that every merchant selling only goods of foreign manufacture, in separate packages, although enjoying the protection of the local government acting under its police powers, may conduct his business, however large, without any liability whatever to state or local taxation in respect of such goods, provided he takes care to have the articles imported separately wrapped and placed in that form in a box, case or bale for transportation to and sale in this country. In this view, if a jeweller desires to buy fifty Geneva watches for the purpose of selling them here without paying taxes upon them *as property*, he need only direct them to be placed in separate cases, however small, and then put them all together in one box. After paying the import duties on all the watches in the box and receiving the box at his store, he may open the box, and the watches, each one being in its own separate case, may then be exposed for sale. According to the contention of the plaintiffs, each watch, in its own separate case, would be an original package, and could not be regarded as part of the mass of property of the State and subject to local taxation, so long as it remained in that form and unsold in the hands of the importer. Other illustrations arising out of the business of American merchants will readily occur to every one. The result would be that there might be upon the shelves of a merchant in this country, ready to be used and openly exposed for sale, commodities or merchandise consisting of articles separately wrapped and of enormous value that could not be reached for local taxation until after he had sold them, no matter how long they had been kept by the importer before selling them. It cannot be overlooked that the interpretation of the Constitution for which plaintiffs contend would encourage American merchants and traders, seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business.

There are other considerations that cannot be ignored in determining the time at which goods imported from foreign countries lose their character as imports and may be properly regarded as part of the general mass of property in the State

subject to local taxation. If, as plaintiffs insist, each parcel separately wrapped and marked and put in the shipping box, case or bale, is an original package which, until sold, no matter when, would retain its distinctive character as an import, although the box, case or bale containing them had been opened, and the separate parcels all exposed for sale, what stands in the way of European manufacturers opening branch houses in this country, and selling all their goods put up in the form of separate parcels and packages, without paying anything whatever by way of taxation on their goods *as property protected by the laws of the State in which they do business?* Indeed, under plaintiffs' view, the Constitution secures to the manufacturers of foreign goods imported into this country an immunity from taxation that is denied to manufacturers of domestic goods. An interpretation attended with such consequences ought not to be adopted if it can be avoided without doing violence to the words of the Constitution. Undoubtedly the payment of duties imposed by the United States on imports gives the importer the right to bring his goods into this country for sale, but he does not simply by paying the duties escape taxation upon such goods as property after they have reached their destination for use or trade, and the box, case or bale containing them has been opened and the goods exposed to sale.

Let us see what this court has said when it has had occasion to determine the meaning and scope of the constitutional provision relating to imports.

The leading case is *Brown* v. *Maryland*, 12 Wheat. 419, 436, 441–444. Brown was indicted under an act of the legislature of Maryland supplementary to an act relating to duties on licenses to retailers of dry goods and for other purposes. The second section of the supplementary act provided: "That all importers of foreign articles or commodities of dry goods, wares or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized *to sell*, take out a license as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to

take out such license, shall be sujbect to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." Laws, Maryland, 1821–22, c. 246, p. 168. The indictment having been sustained, the case was brought to this court and was argued with great ability.

It is important to observe that the question presented was not one of ordinary taxation upon property, but it was—to use the words of Chief Justice Marshall—"whether the legislature of a State can constitutionally require the importer of foreign articles to take out a *license* from the State *before* he shall be *permitted to sell* a bale or package so imported?" That question was considered with reference to the clause forbidding the States from laying imposts or duties on imports or exports, except such as were absolutely necessary for executing their inspection laws and also with reference to the commerce clause of the Constitution. Declining to lay down any rule as universal in its application, the court said: "It is sufficient for the present case to say, generally, that when the importer has *so acted upon* the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, *in his warehouse, in the original form or package in which it was imported*, a tax on it is too plainly a duty on imports to escape the prohibition in the Constitution." Again: "The object of importation is sale; it constitutes the motive for paying duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. . . . The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties."

On behalf of the State of Maryland it was contended that if the importer acquired the right to sell by the payment of duties, he might exert that right when, where and as he pleased, and that the State could not regulate it; that he might sell by retail, by auction, or as an itinerant pedler; that he might intro-

duce articles, such as gunpowder, which would endanger the city, into the midst of its population, as well as articles which would endanger the public health, and thus the power of self-preservation would be denied; and that an importer might bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

To these objections the court, speaking by the Chief Justice, responded: "These objections to the principle, if well founded, would certainly be entitled to serious consideration. But, we think, they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition. This indictment is against the importer for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, breaking up his packages and traveling with them as an itinerant pedler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way. The power to direct the removal of gunpowder is a branch of the police

power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State. The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no farther than to prevent the States from doing that which it was the great object of the Constitution to prevent."

These extracts from the opinion in *Brown* v. *Maryland* establish the following propositions:

1. That the payment of duties to the United States gives the right to sell the thing imported, and that such right *to sell* cannot be forbidden or impaired by a State.

2. That a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer, "in his warehouse, in the original form or package in which it was imported," is a duty on imports within the meaning of the Constitution; and

3. That a State cannot, in the form of a license or otherwise, tax the right of the importer *to sell*, but when the importer has *so acted upon* the goods imported that they have become incorporated or mixed with the general mass of property in the State, such goods have then lost their distinctive character *as imports*, and have become from that time subject to state taxation, not because they are the products of other countries, but because they are property within the State in like condition

with other property that should contribute, in the way of taxation, to the support of the government which protects the owner in his person and estate.

So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the State, and bring them, while in their possession, within the range of local taxation.

We have seen that the plaintiffs, in effect, contend that having paid the duties imposed by the United States they were entitled, without liability to taxation upon the goods as property, to open the boxes in which the separate parcels of goods were transported and put such separate parcels in the hands of agents to be sold wherever, in the State or in the country customers could be found. The separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the State while thus being carried around the country by the importer's agents—no separate parcel, so long as it remained in the particular form in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agents. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for sale, in separate parcels, have been so acted upon by the importer that they have ceased to be imports and have become part of the mass of the property of the State, liable to local taxation. But what is the difference in principle between the case of sales by an importer through travelling agents and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and by employés sells or offers to sell the separate parcels either from the opened box or case in his store or from shelves or counters upon which such parcels have been placed for examination and sale.

In our judgment, the "original package" in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property

subject to taxation by the State as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the State. It was not a tax on the plaintiffs' goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the State the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the Government, and in many instances, with the intent to protect the industries of this country against foreign competition. A different view is not justified by anything said in *Brown* v. *Maryland*. It was there held that the importer by paying duties acquired the right to *sell* in the original packages the goods imported—the Maryland statute requiring *a license from the State* before any one could *sell* "by wholesale, bale or package, hogshead, barrel or tierce," goods imported from other countries. But it was not held that the right to sell was attended with an immunity from all taxation upon the goods *as property*, after they had ceased to be imports and had become by the act of the importer a part of the general mass of property in the State. The contrary was adjudged.

Without further reference to authorities we state our conclusion to be that within the decision in *Brown* v. *Maryland* the boxes, cases or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them

Counsel for Parties.

lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that State, the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade and were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States.

This disposes of the only Federal question arising on this appeal.

The judgment of the Supreme Court of Louisiana is

Affirmed.

MR. CHIEF JUSTICE FULLER, MR. JUSTICE BREWER, MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM dissented.